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FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-6992

RONALD PAUL BISHOP

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Ronald Paul Bishop, who is now held in the Arizona State Prison at Florence, Arizona, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's affidavit in support of this motion is attached hereto.

RESPECTFULLY SUBMITTED this 21st day of June, 1978.

By _____
David Chamberlain
Attorney for Petitioner

Law Offices of
DAVID CHAMBERLAIN
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PRESCOTT, ARIZONA 86301

IN THE SUPREME COURT OF THE STATE OF ARIZONA

THE STATE OF ARIZONA,
Appellee,
vs
RONALD PAUL BISHOP,
Appellant.

NO. 3569
REQUEST FOR TRANSMISSION OF RECORD TO THE UNITED STATES SUPREME COURT

COMES NOW appellant, RONALD PAUL BISHOP, by and through his attorney, DAVID CHAMBERLAIN, and request that the Supreme Court of the State of Arizona prepare and certify a transcript of the record in the above-entitled case, including all proceedings in the court whose judgment was final on March 21, 1978.

It is respectfully requested that this Court transmit and certify to the United States Supreme Court such record in order that petitioner may file a writ of certiorari to the United States Supreme Court based upon that record and transcript.

RESPECTFULLY SUBMITTED this 21st day of June, 1978.

By _____
David Chamberlain
Attorney for Appellant

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PRESCOTT, ARIZONA 86301

IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

RONALD PAUL BISHOP,

Petitioner

vs.

STATE OF ARIZONA,

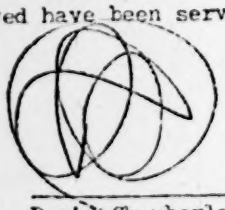
Respondent.

CERTIFICATE OF SERVICE

I, RONALD PAUL BISHOP, hereby certify that I have served copies of the application for stay of execution; request for transmission of the Arizona record to the United States Supreme Court; Writ of Certiorari; appearance form; motion and affidavit to proceed in Forma Pauperis in the above case on counsel for respondent by depositing same in the United States mail, postage prepaid, addressed as follows:

ATTORNEY GENERAL OF THE
STATE OF ARIZONA,
State Capitol Building,
Phoenix, Arizona 85007

All parties required to be served have been served. Done this 21st day of June, 1978.



David Chamberlain
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

RONALD PAUL BISHOP,

Petitioner

-v-

STATE OF ARIZONA,

Respondent.

APPLICATION FOR STAY OF EXECUTION

To the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner, Ronald Paul Bishop, by his undersigned counsel, prays that an order be issued staying the execution of his death sentence for the reasons set out in the Petition for Certiorari filed herewith and the final determination of the matter by this Court.

Wherefore, Petitioner respectfully requests an order staying Petitioner's execution pending further order of this Court.

Respectfully submitted this 21st day of June, 1978.

David Chamberlain
Attorney for Petitioner

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APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

NO._____

RONALD PAUL BISHOP (Petitioner) VS STATE OF ARIZONA (Respondent)

The Clerk will enter my appearance as Counsel for Ronald Paul Bishop who IN THIS COURT is Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States: (ADM. PENDING)

Signature_____

Name David Chamberlain

Address 533 W. Gurley Street

City & State Prescott, Arizona Zip 86301

Phone (602) 778-0651

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IN THE

SUPREME COURT OF THE UNITED STATES

No._____

RONALD PAUL BISHOP,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

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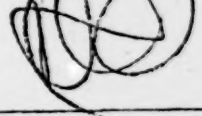

By_____
DAVID CHAMBERLAIN
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

RONALD PAUL BISHOP,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered on March 21, 1978.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at _____ Ariz._____, No. 3569, filed March 1, 1978.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on March 1, 1978. A timely motion for rehearing was denied on March 21, 1978. Jurisdiction of this court is invoked under 28 U.S.C. 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

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QUESTIONS PRESENTED

1. Whether the death penalty in Arizona violates the Eighth Amendment to the Constitution of the United States since it does not permit in mitigation consideration of the character and record and cooperation with law enforcements of the individual offender?

2. Whether petitioner's Fourteenth Amendment right of due process and legal protection were violated because of the overly broad and uneven interpretation of the only aggravating circumstances found in this case, i.e. that the killing was done in an"especially cruel and heinous manner?

3. Whether the admission of petitioner's statements and video tape walk through was a denial of petitioner's Fifth and Sixth Amendment rights in that such statements were obtained in an oppressive manner?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Statutes of Arizona:

> § 13-451. Murder and malice aforethought defined.
> A. Murder is the unlawful killing of a human being with malice aforethought.
> B. Malice aforethought may be expressed or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a follow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Ariz. Rev. Stat. Ann. 13-452

> 13-452. Degree of murder.
> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the preparation of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping or mayhem, or secual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.

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Ariz. Rev. Stat. Ann. 13-453

Punishment for murder.
A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in 13-454.
B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years.

Ariz. Rev. Stat. Ann. 13-454

13-454 Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree.
A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E. and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.
B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of esta-

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blishing the existence of the circumstances set forth in subsection F is on the defendant.
C. The court shall return a special verdict setting forth its findings as to the existence or non existence of each of the circumstances set forth in subsection E and as to the existtence or non existence of each of the circumstances in subsection F.
D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.
E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offence in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, or anything of pecuniary value.

6. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defence to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

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Ariz. Rev. Stat.Ann. 36-501

36-501. Definitions
In this chapter, unless the context otherwise requires:
18. "Mental disorder" means, for purposes of this chapter, a substantial disorder of the person's emotional processes, thought, cognition or memory. "Mental disorder"is distinguished from:

(a) Conditions which are primarily those of drug abuse, alcoholism or mental retardation.
(b) The declining mental abilities that directly accompany impending death.
(c) Character and personality disorders characterized by lifelong and deeply ingrained anti-social behavior patterns, including sexual behaviors which are abnormal and prohibited by statute unless the behavior results from a mental disorder.

1. STATEMENT OF THE CASE

This is an appeal involving the imposition of the penalty of death by lethal gas upon the Appellant by the Honorable James Hancock, Trial Judge, Division Two, Superior Court of the State of Arizona, County of Yavapai.

On March 22, 1976, a Yavapai County Grand Jury indicted the Appellant, along with a Fred James Van Haelst, of Murder in the First Degree in violation of A.R.S. 13-451, 452 and 453, alleging that said murder took place on or about January 22, 1976.

The Trial Court appointed Mr. Billy Hicks to defend Appellant, and that appointment was made on March 22, 1976. Appellant Bishop was arraigned March 29, 1976, at which time he pled not guilty to the charge.

On May 3, 1976, an omnibus hearing was held at which time Defendant sought to have statements made by him, and a video taped "walk through" made at the scene of the crime suppressed. In connection therewith, the defense maintained that violations of Defendant's Miranda rights occurred, both in connection with statements Defendant made while in custody in Texas,

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(O.H.T.pp 103 to 131, and pp 168 to 214)* and in connection with the video tape made near Cleator,

*Note: T. T. - Trial Transcript
M. H. T.1- Initial Mitigation Hearing Transcript
M. H. T.2- Continuing Mitigation Hearing Transcript
O.H.T. - Omnibus Hearing Transcript

Arizona, the scene of the crime, and further as to the prosecutor's involvement as to the voluntariness of the statements made in Texas (O.H.T.p 186 to 196). The Prosecutor, Robert Kuebler, then testified at the omnibus hearing as to the nature of his involvement with the Defendant just prior to the time that Defendant made a second statement to law enforcement personnel in Texas (O.H.T.pp 177 to 214). Prosecutor Kuebler testified that for a period of time he was alone with the Defendant in an interrogation room, but testified further that he did not make any promises or inducements to the Defendant. Within a matter of a few minutes the Texas law enforcement officers reentered the interrogation room and obtained another statement from the Defendant (Supra).

The prosecutor objected to being called as a witness (O.H.T.p175), however the Court overruled that objection (O.H.T. p 176).

Appellant had early moved that because the prosecutor, Mr. Kuebler, was a possible witness to the voluntariness issue, it would not be in the interest of justice for Mr. Kuebler to also prosecute the case (O.H.T.p 99). The Court overruled this defense request. Mr. Kuebler testified as to the taking of the statement in Texas.

Evidence of the making of the video tape at or near the scene of the crime was taken and the evidence indicated that prior to Defendant's "walk through" he was read "Miranda" rights from a standard "Miranda" card (O.H.T.pp 160-161; pp 44-49; T.T. pp 469-470 and p 483).

The testimony indicated that the Defendant was taken to the scene of the filming in a high desert area with a large number of law enforcement officers and a deputy County Attorney present during the filming of the "walk through". Defendant was not represented by Counsel.

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Subsequent to a stipulation to the fact of the finding of the body on February 7, 1976, in a mine shaft near Cleator, Arizona, the case was argued to the impaneled jury. Sargeant Ed Hart of the Yavapai County Sheriff's Office testified to the finding of the body (T.T. p. 230).

Dr. Phillip Keen, M. D., pathologist, testified as to a series of at least two and as many as three or four blows to the deceased's head, resulting in skull fractures and brain damage, any of which blows would have been sufficient to kill the victim. Dr. Keen further testified that the blows appeared to be those resulting from the victim having been struck by a blunt instrument (T.T.p. 275-290).

Tonald Troxwell, the deceased's brother, testified as to the identification of the deceased as his brother and testified further as to the deceased's drinking habits (T.T.p. 291-301).

Catherine Leckliter testified as to being an associate of the deceased, the Defendant, and a co-defendant, Fred Van Haelst. She further testified as to the travels of the group from Phoenix to the Cleator area and testified as to the events leading up to the disappearance of Troxwell. She was not a witness to the actual killing, however, she testified to events prior to and subsequent to Troxwell's disappearance (T. T. p. 301-344).

It should be noted at this point that Van Haelst was subsequently sentenced to a term in the Arizona State Prison of from forty to sixty years upon his negotiated plea to second degree murder, and Catherine Leckliter, also pursuant to a negotiated plea, pled guilty to accessory to grand theft auto. Fred Van Haelst did not testify at the trial. He did, however, testify at the mitigation-aggravation hearing.

Captain J. P. Wallace of the Village Police Department in Texas, testified as to the arrest of the Defendant and Mrs. Leckliter in Texas on March 10, 1976, and testified further as to a preliminary statement

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made by the Defendant in which Defendant denied killing Troxwell but did admit to stealing Troxwell's car (T.T.p. 374-375). Captain Wallace then testified that Defendant altered his statement by indicating that he, in fact, "hobbled" the victim and "pushed him down" and"did not take any money" (T.T. p. 385-386).

At T.T. p. 396 to 405, a foundation was made for the introduction of the video taped evidence based upon the foundational evidence given at the omnibus hearing, due to the inability of the camera operator to be present at trial.

Captain Wallace continued his testimony (T.T.p. 403-404) as to the events surrounding Defendant's (second) statement in Texas. Wallace testified that the other co-defendant, Van Haelst, had been arrested in Texas (March 11th), and that Defendant was aware of this fact (T.T.p. 405). Yavapai deputy County Attorney Kuebler was in the Texas police station and at one point, Defendant apparently requested to talk to Prosecutor Kuebler alone, and after having done so, the Defendant informed the Texas law enforcement officers that he had decided to make a new statement (T.T.p. 406, March 11, 1976). A new statement was made (orally), typed by Texas officials and signed by the Defendant (T.T.p. 408). This statement (State's Exhibit 16), in which the Defendant admitted striking the victim two or three times with a hammer and then dragging the victim a distance to the edge of a "mine shaft", was identified by Captain Wallace (T.T. p. 409-410) and introduced and read to the jury (T.T.p. 412-415).

Officer R. A. Stevens, of the Village Police Department, next testified (T.T.p. 434-451). At T.T.p. 446-447, Officer Stevens testified that, in fact, Prosecutor Kuebler was alone with the Defendant for a short period of time proceeding Defendant's last written statement. Officer Calvin Stuart, of the Yavapai County Sheriff's Office, next

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testified (T.T.p 452-465) as to the photographs taken at the scene, material evidence collected at the scene of the crime, and (at T.T.p 464) testified as to Defendant's statements that he had feared the deceased; the statement made March 20, 1976. Officer Ed Mart, of the Yavapai County Sheriff's Office, then testified (at T.T.p 465-480) as to the filming of the video tape at the scene regarding the "walk through" made by Defendant, and further testified to the fact that there were a number of officers present and also the deputy County Attorney Kuebler. At T.T. p 481-502, Mr. Ronald Shutt, an investigator with the Yavapai County Sheriff's Office, testified as to a display of hammers and selection in which the Defendant participated, and as to the "walk through" video procedure. It should be noted that most, if not all, of the officers who testified as above, indicated that Defendant had been read Miranda rights from a standard Miranda card, on several occasions, although the video and hammer display procedures at the crime scene occupied several hours. It should also be noted that the evidence presented demonstrated that Defendant was taken to the scene for these purposes immediately after his arrival by automobile from Texas, accompanied by law enforcement officers. The Defendant had not yet been taken to Prescott, but rather, to the scene at Cleator. (T.T.p 468).

Mr. Richard Stewart, of the Yavapai County Attorney's Office, then read the pre-trial hearing transcript quoting the video camera operator, Max Merritt, of Prescott, Arizona, for the purpose of establishing the foundation for the video tape "walk through" (T.T.p 509-534). The video tape was subsequently shown to the jury, in addition to an audio transcript of the video taping.

The Defendant, Ronald Paul Bishop, then testified (T.T. p 535-619). The Defendant's testimony reflected a theory of self defense and confusion (T.T. p 599) in that, while Defendant admitted hitting the deceased at

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least two times, with a hammer which was in the trunk of the deceased's car, the Defendant maintained that the deceased advanced upon him in a threatening manner, and, inasmuch as the deceased was, in Defendant Bishop's opinion, eminently dangerous to Defendant, Defendant hit the deceased to prevent being harmed himself. The prosecutor (Kuebler) asked Defendant, "How could you hit him that hard?" (T.T.p. 604). Defendant further testified that he did not know if the deceased was semi-conscious or not immediately after the blows were struck (T.T.p. 605).

At T.T.p. 620-639, jury instructions were discussed by Court and counsel and the case went to the jury.

The jury returned a verdict of murder in the first degree, and a mitigation-aggravation hearing, pursuant to A.R.S. 13-453, 454 was set for June 10, 1976.

At the mitigation-aggravation hearing, Mr. Fred J. Van Haelst testified. Van Haelst had not yet been sentenced for his participation in the killing (M.H.T.-1, p. 11-37). Van Haelst testified that he saw the Defendant hit the deceased with a hammer (M.H.T.-1, p. 17), and that the Defendant swung the hammer "pretty hard" (M.H.T. -1, p. 19), and further, that the Defendant then "rolled the victim over on his side" (M. H. T. -1, p. 20), and that the deceased, immediately after having been hit by Defendant, was "gasping-still alive" (M.H.T.-1, p. 22). At M.H.T.-1, p. 28 Van Haelst admits having been convicted of two major felonies, including his participation in the death of Troxwell.

The mitigation-aggravation hearing then continued with the testimony of the following witnesses:

Edward Bishop, Defendant's Brother - (M.H.T.-2 p. 5-9)

Gerald Rybeck, an acquaintance of Defendant-(M.H.T.-2 p. 10-13)

Daul Ann Wheeldon, Defendant's sister- (M.H.T.-2 p. 13-16)

Mrs. Donna Bishop, Defendant's sister-in-law-(M.H.T.-2 p. 17-19).

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The substance of the testimony of these four witnesses was that the Defendant had always been a law abiding citizen, had not been prone to violence, and had not been, to their knowledge, anything other than a peaceful citizen, and in the case of each witness, it was indicated that they had known the Defendant for a sufficiently long time to state his lack of proclivity to violent or anti-social behavior.

Prior to sentencing, counsel for the Defendant argued that the Defendant had only a sixth grade education, had low intelligence and had no known criminal history (M.H.T.-2, p. 22). Counsel further argued that there were at least two blows to the head of the deceased, causing death, and that there was no torture or other unnecessary pain (M.H.T.-2, p. 25), and that in the area of mitigation, Defendant was experiencing both duress and impaired capacity (M.H.T.-2, p. 26), and further, that co-defendant Van Haelst had been sentenced to a term in the Arizona State Prison of from forty to sixty years, and as the closest accessory, Van Haelst's sentence would be wholly disproportionate if Defendant Bishop were sentenced to death.

The Trial Court, pursuant to the jury's verdict, found the Defendant guilty of murder in the first degree, and pursuant to A.R.S. 13-453 and 454, found that, as to A.R.S. 13-454 (E) (6), that the capital crime was committed in an "especially heinous, cruel and depraved manner". The Court found only that particular aggravating circumstance.

The Trial Court then went on to state that the Defendant had committed an "act designed to inflict a high degree of pain."

The Court also stated that:

> "...The use of a hammer as a murder weapon was cruel, it was designed to inflict, and did inflict a high degree of pain. Your crime was unnecessarily torturous to the victim because he was apparently alive when you tied his feet and pulled him along the ground to the mine shaft...."

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The Trial Court found the existence of no mitigating circumstances sufficient to call for leniency and sentenced Defendant Bishop to death by lethal gas (M.H.T.-2, p 42).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to trial and at the sentencing hearing, petitioner challenged the constitutionality of the death penalty in Arizona, Ariz. Rev. Stat. Ann. 13-454, as being unconstitutional in that it constituted cruel and unusual punishment in violation of petitioner's Eighth and Fourteenth Amendments rights. This motion was denied. On Appeal and prior to Appeal petitioner raised the same argument as set out in this petition in addition to other arguments which petitioner here incorporates.. See Arizona v Bishop, _____Arizona_____ No. 3569 Arizona Supreme Court.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUR OF THE SENTENCE OF DEATH IN ARIZONA VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES SINCE THE ARIZONA DEATH PENALTY STATUTES PRECLUDE CONSIDERATION OF THE CHARACTER AND RECORD OF THE INDIVIDUAL OFFENDER.

Arizona's death penalty statute Ariz. Rev. Stat. Ann. 13-454 fails to meet constitutional standards since it does not take into consideration "the character and record of the individual offender" and is in violation of the Eighth Amendment to the Constitution of the United States. Gregg v. Georgia, ____U.S.____, 49 L. Ed. 2d 859, 96 S.Ct.____(1976); Proffitt v. Florida, ____U.S.____, 49 L. Ed. 2d 913, 96 S. Ct.____(1976); Jurek v. Texas, ____U.S.____, 49 L. Ed.2d 929, 96 S. Ct.____(1976); Woodson v North Carolina, ____ U. S.____, 49 L. Ed. 2d 944, 96 S. Ct.____ (1976);

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Roberts v. Louisiana, ____U.S.____, 49 L. Ed. 2d 974, 96 S. Ct.____ (1976).

The Arizona Statute focuses solely on the offense and not the offender and it is this substantive difference which distinguishes it from the Florida death penalty scheme, Fla. Stat. Ann 921.141, and results in its unconstitutionality.

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authorities discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to the judge and jury by by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances that each individual homicide and individual defendant in deciding whether the death penalty is to be imposed. Proffitt v. Florida, 49 L. Ed. 2d at 926.

The failure of the Arizona statute to allow individualized consideration of the defendant presents a question which merits review by this court concerning the viability of the Arizona death penalty statute in light of Gregg, Proffitt, Jurek, Woodson and Roberts.

In Arizona, the trial court balances the existence and non-existence of aggravating and mitigating factors and if one aggravating circumstance is found and there exists no mitigating circumstances "sufficiently substantial to call for leniency," the court must impose the penalty of death. Ariz. Rev. Stat. Ann. 13-454 (D); State v. Blazak, ____Ariz.____, 560 P. 2d 54, 60-61 (1977).

Evidence relevant only to the enumerated six aggravating circumstances, Ariz. Rev. Stat. Ann. 13-454 (E) or four mitigating circumstances, Ariz. Rev. Stat. Ann. 13-454 (F) may be presented. No other evidence may be considered. Ariz. Rev. Stat. Ann. 13-454 (B) and (D); State v. Richmond,

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560 P. 2d 41, 50; State v. Jordan, ____Ariz.____,____P.2d____, (S. Ct. 3156, filed January 30, 1977). (See appendix B).

Similarly, appellate review of the imposition of the death penalty is limited to determing "the presence or absence of aggravating and mitigating circumstances." State v. Richmond, 560 P. 2d at 51. Again, the statute has limited appellate consideration to the offence and not the individual.

The only evidence which may be presented in mitigation is that which is relevant to the four enumerated mitigating circumstances. These circumstances are:

> 1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
> 2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
> 3. He was a principle, under Section 13-452, Arizona Revised Statute, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
> 4. He could not reasonably have foreseen that his conduct in the course in the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.
> Ariz. Rev. Stat. Ann. 13-454 (F)

These four mitigating factors focus strictly on the offense. The strict mandate of the statute, Ariz. Rev. Stat. Ann. 13-454 (B) and (D) and the interpretation of this statute by the Supreme Court of the State of Arizona. State v. Richmond, supra; State v. Jordan, supra, preclude the introduction of evidence relevant to the defendant's age, lack of prior criminal history or his emotional or intellectual levels. Thus, the defendant is prevented from challenging the imposition of the death penalty based on any mitigating circumstances which focus on the defendant as a person.

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Such a narrowing of the circumstances in mitigation and the preclusion of the introduction of such evidence which may justify a finding that the death penalty should not be imposed is contrary to this Court's mandate in Gregg, Proffitt, Jurek, Woodson and Roberts.

Although the Georgia statutory scheme does not enumerate specific mitigating factors which the jury is to consider in imposing the death penalty, the jury and subsequently the trial court, have before them "additional evidence in extenuation, mitigation and aggravation of punishment . . . ." Gregg v. Georgia, 49 L. Ed. 2d at 869. Factors which focus on the characteristics of the individual such as his age, the extent of police cooperation at the time of the offense, his emotional state at the time of the offense, and his lack of prior convictions for capital offenses may be considered by the jury and trial court. Gregg v. Georgia, 49 L. Ed. 2d at 888.

The Georgia statutory scheme which provides narrowly drawn aggravating circumstances for which capital punishment may be imposed and which affords a defendant an opportunity to present any evidence with respect to the commission of the offense and his personal characteristics affords sufficient protection against the "freakish and wanton" application of the death penalty.

Similarly, the Florida statutory scheme was found to be constitutionally permissible since it afforded a defendant the same protection.

In Florida, the jury and ultimately the trial court, balance the existence or non-existence of aggravating and mitigating circumstances to determine whether the death penalty should be imposed. This system procedurally similar to the Arizona death penalty statute was adopted from the Model Penal Code 210.6. Proffitt v. Florida, 49 L. Ed. 2d at 920; State v. Richmond, 560 P. 2d at 53.

The Florida scheme, Fla. Stat. Ann. 921.141 (5) and (6), enumerates eight aggravating circumstances and seven mitigating circumstances and in addition to the enumerated mitigating circumstances

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> evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specific aggravated and mitigating circumstances. Proffitt v. Florida, 49 L. Ed. 2d at 920-921.

In addition to focusing on the defendant's participation at the time time of the offense, the Florida statute provides that in mitigation the jury and trial court may consider the defendant's lack of prior criminal history and his age. The deciding body has before it any and all evidence relevant both to the defendant himself and to his involvement in the offense for which he is being sentenced.

Texas statutory scheme, although dissimilar to either the Georgia or Florida statutes was held to be constitutionally permissible since it afforded the same protection to the defendant as did Florida and Georgia. Jurek v. Texas, 49 L. Ed. 2d at 941. Although the statute on its face does not provide for the introduction of mitigating circumstances, the Texas Court of Criminal Appeals has interpreted the statute

> so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. Jurek v. Texas, 49 L. Ed. 2d at 939.

This Court was persuaded of the viability of the Texas statute since the jury could consider the prior criminal history of the defendant, his age or his emotional state at the time of the offense in addition to mitigating evidence concerning his involvement in the crime for which he is to be sentenced. Jurek v. Texas, 49 L. Ed. 2d at 939.

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Jurek v. Texas, 49 L. Ed. 2d at 941.

A statute which fails to afford this individualized consideration of the defendant and his involvement in the offense for which the penalty of death is to be imposed will be found constitutionally lacking. Woodson v. North Carolina, 49 L. Ed. 2d at 944. Similarly, a mandatory

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death penalty statute which provides neither standards to channel the jury's determination of whether the death penalty should be imposed nor meaningful appellate review has been found to be constitutionally infirm. Roberts v. Louisiana, 49 L. Ed. 2d at 981 and 983.

This same individualization is lacking in the Arizona death penalty scheme. Each of the enumerated mitigating factors of the statute focuses only on the defendant's involvement in the offense itself.

In addition the absence of a prior criminal history cannot be introduced to indicate a lack of propensity on the part of the defendant to transgress the Law. Such a mitigating factor is not enumerated within the four narrow categories of the statute. The narrowness of such factors in effect precludes any meaningful consideration of who is the defendant.

> Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.
> Gregg v. Georgia, 49 L. Ed. 2d at 889.

The statute in Arizona fails this test.

This court should grant review to determine whether the Arizona death penalty statute is constitutional in light of the statute's failure to afford a consideration of the particularized circumstances of the defendant.

It should be noted again that on May 12, 1978, Arizona Federal District Judge Carl A. Muecke enjoined the State of Arizona from imposing the death penalty on any person for the reason that the Court found the statute to be in conflict with provisions contained in the Eighth and Fourteenth Amendments to the United States Constitution, pending further order of that Court. See Knapp v. Cardwell and the State of Arizona, No. 78385, ____Ariz.____.

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11. PETITIONER'S DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT WERE VIOLATED BECAUSE ARIZONA DEATH PENALTY STATUTE PROVIDES AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS DONE IN AN ESPECIALLY HEINOUS AND CRUEL OR DEPRAVED MANNER. THE TRIAL COURT IN THE INSTANT CASE FOUND THAT THE KILLING HAD BEEN DONE BY BLOWS TO THE VICTIM'S HEAD WITH A HAMMER AND THE MEDICAL TESTIMONY AT TRIAL DID NOT SUPPORT THE TRIAL COURT'S PRESUMPTION THAT THE KILLING WAS ESPECIALLY HEINOUS, DEPRAVED OR CRUEL. THEREFORE, THE DISCRETION ALLOWED THE TRIAL COURT AS TO THIS AGGRAVATED CIRCUMSTANCE IS SO OVERLY BROAD AS TO RENDER THE ARIZONA DEATH PENALTY, A.R.S. 13-454 (E) (6) UNCONSTITUTIONAL.

The Florida statute from which Arizona's was taken and from which the authority in this regard lies, upholds petitioner's position. See State v. Dickson (1973) 283 So. 2d 1; Alford v. State (1975) 307 So 2d 433; Swan v. State (1975), 322 So 2d 485.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION OF PETITIONER'S STATEMENT AT TRIAL WAS VIOLATIVE OF HIS FIFTH AND SIXTH AMENDMENT RIGHT INVOLVING SELF INCRIMINATION AND RIGHT TO COUNSEL.

At a video tape "walk through" at the scene of the crime, petitioner was without counsel of any kind and the totality of the circumstances strongly suggest an immense uneven weight of the State's law enforcement capacity contrasted with an isolated defendant.

CONCLUSION

Petitioner prays that a writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6992

RONALD PAUL BISHOP,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR

WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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NO. 77-6992

RONALD PAUL BISHOP,

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RESPONSE TO PETITION FOR

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QUESTIONS PRESENTED

I. DOES THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR?

II. WAS PETITIONER DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER? DID THE COURT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH?

III. WAS BISHOP IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL?

STATEMENT OF THE CASE

On January 18, 1976, petitioner, Ronald Paul Bishop, victim Norman Troxell, Fred Van Haelst, Catherine Leckliter, and Catherine's 2-year-old daughter met at the Salvation Army Welfare Center on 9th Avenue in Phoenix. (R.T., Vol. III at 303, Vol. IV at 535.) Norman Troxell was the only one of these individuals who had a car, a 66 Chevrolet Caprice. (R.T., Vol. III at 307.) They decided to travel together. (Id. and R.T., Vol. IV at 539.) On January 20 the group left Phoenix and traveled to the Bumble Bee area near Prescott. (R.T., Vol. III at 308, R.T. June 10, 1976 at 14.) They camped out in the open that evening. During the course of that evening Bishop, Leckliter, and Van Haelst discussed the problem of Troxell's continual drinking. (R.T., Vol. III at 310, Vol. IV at 546, June 10, 1976 at 15.) Troxell was apparently drunk all of the time, and spent most of the time sleeping in the back seat of the vehicle. (R.T., Vol. IV at 542.) In the conversation concerning Troxell's condition, Van Haelst suggested they could "try to sober him up." (R.T., Vol. III at 310.) Bishop said that would do no good, and that they would have to "get rid of him" or "do him in." (Id. and R.T., June 10, 1976 at 16.) There was further conversation along the same lines, the following day. (Id.) Bishop stated they had to do Troxell in because they needed the car. (R.T., June 10, 1976 at 16.)

On the morning of January 22, Bishop told Van Haelst that "he had found the perfect place to put him in." (R.T., Vol. III at 313 and 316.) The party went into town for groceries, then returned to the campsite. Van Haelst, at Bishop's direction, told the woman, Leckliter, to take the little girl and go for a walk. (R.T., Vol. III at 317, June 10, 1976 at 16.) Troxell was sleeping in the car. Bishop went over by the car, and asked Troxell to get out of the car. (R.T., Vol. IV at 555, June 10,

1976 at 17.) Troxell got out and went to the back of the vehicle to urinate. (R.T., June 10, 1977 at 17.) At that time Bishop struck Troxell on the head with a hammer. As Troxell went down Bishop struck him at least once more. (Id. at 17-20.) Bishop removed Troxell's wallet, watch, and shoes. (Id. at 20 and R.T., Vol. IV at 564.) Then Bishop hog-tied Troxell's feet with rope. Bishop had taken the rope off a dead cow earlier, and placed it in the trunk. (R.T., June 10, 1976 at 21; Vol. IV at 566.) Bishop and Van Haelst dragged Troxell toward a mine shaft. Troxell was gasping and still alive. (R.T., June 10, 1976 at 22.) Bishop put Troxell on the edge of the hole, believing Troxell would fall in the hole because Troxell was still alive and struggling. [Statement of Appellant Bishop (State's Exhibit 3 for Voluntariness Hearing, admitted into evidence at R.T., Vol. I at 76]; also R.T., Vol. IV at 569.) He fell into the mine shaft. (Id.) Bishop then threw rocks up to a foot and half in diameter into the hole on top of Troxell, who Bishop said was then wiggling around or trying to get up. [State's Exhibit 6 for Voluntariness Hearing (transcript of videotape); also R.T., June 10, 1976 at 23.)

Following the murder of Troxell, Bishop and the others traveled in Troxell's car to Oregon, and finally to Texas. An identification of the murder victim's body caused a nation-wide bulletin to be issued giving the description and license number of the Troxell vehicle. (R.T., Vol. I at 26.) Texas law enforcement officers spotted the car, and stopped and arrested its occupants, Bishop and Leckliter, at which time Bishop received the Miranda warnings. (R.T., Vol. I at 59.) Upon arrival at the police station, Bishop was again given the Miranda warnings. (R.T., Vol. I at 60.) Texas law required that Bishop immediately be given Miranda warnings by a Magistrate.

This was done, Bishop being advised in person by the Magistrate and signing a written form explaining the rights. (R.T., Vol. I at 61-63, State's Exhibit for Voluntariness Hearing.)

Bishop had had Leckliter draw up a false bill of sale for the Troxell vehicle. (R.T., Vol. III at 305 et seq., Testimony of Leckliter.) Initially, Bishop stated that the most the law enforcement officers had on him was stolen vehicle. (R.T., Vol. I at 65.) Subsequently Bishop made a statement to the Texas authorities. Before making it he was reminded of his Miranda rights. In it he claimed Troxell was alive when he left him. (R.T., Vol. I at 65, State's Exhibit 2 for Voluntariness Hearing.)

Catherine Leckliter abandoned the store about the false bill of sale, and confessed to authorities her knowledge of what went on. (R.T., Vol. I at 57.)

At a second interview, prior to which Bishop was again reminded of his Miranda rights, Yavapai County Prosecutor Robert Keubler was present. (R.T., Vol. I at 70.) At one point in the interview, Bishop learned that Van Haelst had been apprehended. At that point he stated that he wished to talk to Kuebler in private. (R.T., Vol. I at 72 and 107.) The law enforcement officers left the room, but Detective Stephens did not leave the area. (R.T., Vol. I at 107.) Leaving the door cracked, Detective Stephens remained just outside within 2-3 feet of appellant where he could see Bishop and hear what was said. (R.T., Vol. I at 108.) He heard Bishop say "I might as well tell the truth. I was lying about that other statement." (R.T., Vol. I at 108.) Then Detective Stephens heard Bishop tell Kuebler what really happened. (R.T., Vol. I at 109.)

After about 5 mintues, the law enforcement officers were asked back into the room. (R.T., Vol. I at 110.) At that point Bishop repeated his new statement to the officers. The statement was typed up from notes made by the officer and the

prosecutor. (R.T., Vol. I at 74-76.) Bishop read the statement, which included once more, the Miranda warnings, and signed it. (Id. and State Exhibit 3 for Voluntariness Hearing.)

Upon being returned to Arizona, Bishop agreed to a video-taped "walk-through" at the scene of the murder. He was advised of his Miranda rights prior to reaching the area, and told they intended to film the walk-through. (R.T., Vol. I at 33 and 47.) At the area before filming, he was asked whether he had been advised of those rights and responded that he had been. (R.T., Vol. I at 135.) Bishop identified the type of hammer he had used, and showed the officers where the events of the murder had occurred. (R.T., Vol. I at 131-68.)

After a trial by jury, Bishop was found guilty of the first degree murder of Norman Troxell. (See Minute Entry dated May 19, 1976 at 3.) An aggravation-mitigation hearing was held, following which the trial court found that the murder had been committed in an especially heinous, cruel, or depraved manner. The court further found no mitigating factors sufficient to call for leniency. (R.T., Vol. V at 38-42.) The death penalty was therefore imposed. Bishop's conviction and sentence of death were affirmed by the Arizona Supreme Court on March 1, 1978. State v. Bishop, ____ Ariz. ____, 576 P.2d 122 (1978).

. . .

. . .

. . .

ARGUMENT

I

THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR.

Petitioner contends that the Arizona death penalty law is unconstitutional because it improperly limits the mitigating factors the court may evaluate, and focuses on the nature of the offense itself rather than the character of the offender. Petitioner urges that Arizona's death penalty provision does not resemble the statutory schemes of states whose death penalty provisions have been upheld by this Court.

The United States Supreme Court granted a petition for writ of certiorari in Jordan v. Arizona, No. 76-6965 (U.S., July 3, 1978), a death penalty case. The United States Supreme Court vacated that portion of the opinion of the Arizona Supreme Court that left undisturbed the death penalty imposed on petitioner Jordan. The court remanded the case to the Arizona Supreme Court for proceeding in harmony with Lockett v. Ohio, 438 U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1978).

On July 20, 1978, the Arizona Supreme Court issued its opinion in State v. Watson, No. 3089 (July 20, 1978), a death penalty case, which challenged the number and type of mitigating factors utilized by the court in fixing capital punishment. (See Attachment A.) In the Watson decision, the Arizona Supreme Court determined the statutory restriction on the presentation of mitigating factors pursuant to Ariz.Rev. Stat.Ann. § 13-454 was unconstitutional. In view of the fact Ariz.Rev.Stat.Ann. § 13-454 (under which petitioner was sentenced) is now deemed invalid, it appears petitioner's recourse is in some state judicial hearing. Respondent submits it is presently unnecessary for the United States Supreme Court to consider petitioner's

application for writ of certiorari since the primary issue upon which he relies, Issue I, is moot.

ARGUMENT

II

PETITIONER WAS NOT DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER. THE COURT DID NOT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH.

Bishop contends that the aggravating circumstance of Ariz. Rev.Stat.Ann. § 13-454 of a cruel or heinous slaying which warrants the imposition of the death penalty, is not harmonious with the constitutionally valid death penalty statute and former cases of Florida.

Following the trial and aggravation hearing in this matter, the trial court pronounced sentence in petitioner Bishop's case. In regard to the aggravating circumstances the court stated:

> "In determining aggravating circumstances I have considered only evidence admitted at the trial of this case and [evidence] governed by the Rules for the admission of evidence at the criminal trial.
>
> * * *
>
> "Pursuant to A.R.S. 13-454E, as to aggravating circumstances, I find as follows:
>
> * * *
>
> "I do find that you committed the offense in an especially heinous, cruel or depraved manner.
>
> "Mr. Bishop, I find your murder of Norman Troxell was a malicious, premeditated, vicious act designed to inflict a high degree of pain with utter indifference for the suffering or regard for human life. Your use of a hammer as the murder weapon was cruel; it was designed to inflict, and did inflict a high degree of pain.
>
> "Your crime was unnecessarily torturous to the victim because he was apparently alive when you tied his feet and pulled him along

the ground to the mine shaft. You left Mr. Troxell later to return and find him at the bottom of the shaft wherein you proceeded to throw rocks and dirt on him.

"Your act lacked any moral sense, any appreciation for life.

"What you did was vicious beyond the comprehension of the ordinary person.

"What you did was outrageously cruel and heinous and done in a depraved manner."

(R.T., Vol. V at 38-41.)

Bishop contends that the murder of Troxell was not cruel and heinous since the pathologist did not so characterize that slaying. Dr. Phillip Keen, the Yavapai County Coroner, testified Troxell died from multiple skull fractures. The doctor stated that approximately simultaneous with the head injuries, Troxell's leg was broken. (R.T., Vol. II at 280-90.) Bishop has not cited any authority for his theory that a cruel and heinous murder can only be established by medical testimony. In the matter sub judice it was unnecessary to examine the doctor on the quality and type of death Troxell met, since petitioner by his own words and recollection of the events surrounding the killing gave facts which demonstrated the murder was indeed heinous and cruel.

According to Bishop's own statements his victim was slowly killed:

"He turned sideways and I hit him in the front part of the head with the hammer. It wasn't actually that hard. I hit him a second time in the back of the head. He fell but he wasn't unconscious.

"I heard someone say 'there's a truck coming,' so I put the rope around his feet and gradually pulled him down to where the open shaft was. That was about fifty feet. The shaft was about eight or nine feet deep. I put Norman on the side of the hole. He was struggling and he fell into the hole. I believed he would fall into the hole."

(Statement by appellant, R.T., Vol. I at 414, State's Trial Exhibit 16 admitted into evidence at R.T., Vol. I at 411.) (Emphasis added.)

And:

> "Bishop: He was dragged down the road where at that time he was still alive. Ah, he was dragged by the edge of this here and let down slowly with my hands on him so he wouldn't roll fast enough to hit his head on anything. Like I repeat to say, he was still alive at that time and he was laying cross-ways with his head this way and his feet were tied at that time. . . . After dragging him down or gradually letting him down the hill, he was placed on this spot here. I'd say approximately one . . . two feet from the entrance of the pit. The pit. We call that pit a hole. I went back up to the top of the hill to check to see if any vehicles was coming down, where there wasn't. When I remained back down here he was in the hole . . . uh . . . by wiggling around or trying to get up, one or the other. So to cover up this . . . uh . . . body or the clothing, there was rocks placed on top of him . . . uh loose sand and loose rocks."
>
> (Transcript of Videotape, State's Trial Exhibit 19A, admitted into evidence at R.T. Vol. IV at 532.) (Emphasis added.)

And:

> "Q. And what was done with Mr. Troxell at that time?
>
> "A. He was drug from behind the car.
>
> * * *
>
> "Q. Can you describe what you saw, what his physical condition was?
>
> "A. He was gasping. He was still alive. . . ."
>
> (Testimony of Fred Van Haelst, R.T., June 10, 1976 at 22.) (Emphasis added.)

Thus, after a 2 day discussion, Bishop decided to kill Norman Troxell because Troxell was a drunk, and also because Bishop wanted Troxell's car. Bishop struck his victim with a hammer while the victim, half drunk and unaware of the impending blow, was urinating. When the victim fell, moaning, to his knees, Bishop struck him on the head with the hammer a second time. Using a piece of rope taken from a dead cow, Bishop dragged his

victim, who was still alive and gasping, to the edge of an empty mine shaft. While Bishop went to check for possible observers, the victim, who was struggling and writhing near the edge of the hole, fell helplessly into the abandoned shaft. Bishop returned and finding his victim already in the hole, proceeded to throw gravel and rocks, some as large as 1 foot in diameter on top of the victim. Bishop then proceeded calmly away from the scene in the victim's car, for which he subsequently forged a bill of sale. The record therefore shows the trial court correctly determined that the killing of Norman Troxell was done in an especially heinous, cruel and depraved manner. Ariz.Rev.Stat.Ann. § 13-454(E)(6).

Bishop's citation to the Florida cases of State v. Dixon, 283 So.2d 1 (Fla. 1973); Swan v. State, 322 So.2d 485 (Fla. 1975), Alford v. State, 307 So.2d 433 (Fla. 1975), are not useful to the resolution of the issue he raised and do not support his legal theory. In each of the foregoing cases, the Florida Supreme Court reviewed the imposition on the death penalty upon an offender who murdered his victim in a manner determined by the court to be cruel or heinous. Those cases do not demonstrate the infirmity of the similar Arizona death penalty statute. Those Florida cases do not indicate Bishop was denied due process fairness when the trial court determined Troxell met his death in a cruel and heinous way.

. . .

. . .

. . .

ARGUMENT

III

BISHOP WAS NOT IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL.

Bishop urges that the court erred in allowing evidence of his statements at a videotaped interview to be admitted. Bishop has not advanced any legal theory or appropriate citations to authority to support this hypothesis.

The record below indicates that Bishop was advised of his Miranda rights prior to the walk-through, and indicated he understood them. (R.T., Vol. I at 33-34, 147, 170.) The purpose of the walk-through and the fact of videotaping were explained to him prior to advising him of the Miranda rights. (R.T., Vol. I at 34, 43, 46-48, Vol. IV at 581.) Bishop was cooperative in allowing the videotape. (R.T., Vol. I at 148.) Detective Meritt testified: "I do recall him [Bishop] indicating his agreement as he did on film, to go along with the filming." (R.T., Vol. I at 172.) Finally, Bishop stated:

> "Okay, before this started ah, I was advised of my right to stay silent and not to have anything said not unless I wanted an attorney present. I broke the violation of my rights and wanted to get everything on tape and sound to have a closed hearing."
>
> (Transcript of videotape, State's Trial Exhibit # 19A.)[1]

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[1]Bishop's reference to a "closed hearing" apparently referred to the possibility that he could get a closed trial because of his fear of retribution by the victim's family. (See R.T., Vol. I at 203, Vol. IV at 587.)

The preponderance of the evidence supports the trial court's determination that Bishop's participation in the videotaped walk-through was voluntary and was done with the understanding that, pursuant to Miranda warnings, his statements and actions on the tape could be used against him at trial.

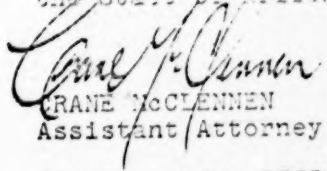
The trial court correctly denied Bishop's motion to suppress. Bishop was not improperly denied any constitutional right.

CONCLUSION

The petition for writ of certiorari should be denied for one or more of the foregoing reasons.

Respectfully submitted,

JOHN A. LaSOTA, JR.
Attorney General of
the State of Arizona



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, CRANE McCLENNEN, Assistant Attorney General, State of Arizona, being first duly sworn, upon oath, declares that pursuant to Rule 33, I have served a copy of the attached Response to Petition for Writ of Certiorari on counsel for petitioner herein by depositing the same, addressed as follows, in the United States mail:

DAVID CHAMBERLAIN, Esq.
533 W. Gurley Street
Prescott, Arizona 86301

Said service was sent postage prepaid on July 24, 1978.

CRANE McCLENNEN

SUBSCRIBED AND SWORN to before me this 24th day of July, 1978.

NOTARY PUBLIC

My Commission Expires:

September 13, 1981

CLIFFORD H. WARD
CLERK

Supreme Court
STATE OF ARIZONA
Phoenix
85007

CHIEF DEPUTY CLERK

March 22, 1978

STATE OF ARIZONA, Appellee,	)	Supreme Court No. 3569
vs.	)	Yavapai County No. 7965
RONALD PAUL BISHOP, Appellant.	)	

The following action was taken by the Supreme Court of the State of Arizona on March 21, 1978 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Affriming Judgment and Sentence enclosed herewith.

CLIFFORD H. WARD, Clerk
By Pat Hoelle
Deputy Clerk

TO: David Chamberlain, Esq., 533 West Gurley, Prescott, Arizona 86301
Hon. John A. LaSota, Jr., Acting Attorney General, 200 State Capitol, Phoenix, Arizona 85007
William L. Hicks, Yavapai County Attorney, Yavapai County Courthouse Prescott, Arizona 86301
Ronald Paul Bishop, Arizona State Prison, Box 35804, Florence, Arizona 85232

(42)

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA,

Appellee,

v.

RONALD PAUL BISHOP,

Appellant.

No. 3569

FILED
MAR - 1 1978
CLIFFORD H. WARD
CLERK SUPREME COURT
BY

Appeal from the Superior Court of Yavapai County

Cause No. 7965

The Honorable James Hancock, Judge

AFFIRMED

Bruce E. Babbitt, The Attorney General — Phoenix
By William J. Schafer III and
Diane M. DeBrosse
Assistant Attorneys General
Attorneys for Appellee

David Chamberlain — Prescott
Attorney for Appellant

HOLOHAN, Justice

The appellant, Ronald Paul Bishop, was tried and convicted by a jury of first-degree murder on May 19, 1976. On June 18, 1976 following an aggravation-mitigation hearing pursuant to A.R.S. § 13-454(E), the trial judge sentenced appellant to death, finding that the offense had been committed in an

especially heinous, cruel and depraved manner, and that no mitigating circumstances existed. This appeal followed.

Appellant Bishop, Fred Van Haelst, Catherine Leckliter and her two-year-old daughter met each other and the victim, Norman Troxell, at the Salvation Army Welfare Center in Phoenix on January 18, 1976. After deciding to travel together, the group left Phoenix for Bumble Bee, Arizona in Troxell's 1966 Chevrolet on January 20, 1976. Troxell was apparently a heavy drinker and was drunk throughout the group's travels in the Arizona desert.

On the morning of January 22, appellant Bishop instructed Van Haelst to tell Mrs. Leckliter and her daughter to take a walk far from the camp. This was accomplished.

Appellant next awakened the victim, who was sleeping in the car, and asked him to look at the car's engine. He then asked the victim to inspect a broken light over the license plate at the rear of the automobile. While he stood at the rear of the car, appellant inflicted several blows to the back of the victim's head with a claw hammer. The appellant stated that Troxell fell but that he was not unconscious and that after Troxell fell, appellant removed Troxell's watch, wallet and shoes and tied his legs together with a rope.

The appellant testified that he and Van Haelst then dragged the victim toward an abandoned mine shaft, which was approximately 15 feet deep. The appellant denied that he threw the victim into the mine shaft, asserting instead that because the victim was alive and struggling, he fell into the shaft on his own. The appellant also testified that after he discovered that Troxell had not only fallen into the mine shaft but was apparently continuing to struggle, he threw rocks

on top of the victim.

Appellant and Van Haelst next did what they could to clean up the area, by covering the bloodstains with mud and scattering the traces of their camp. They burned some of Troxell's belongings in the fire before extinguishing it, and later dropped the remainder of the possessions over a steep cliff. When Mrs. Leckliter returned with her daughter, they left in Troxell's car.

Appellant and his companions traveled to Oregon and later to Texas in Troxell's car. At some point during their journey, Mrs. Leckliter forged a bill of sale to Troxell's car.

Meanwhile, Troxell's body was discovered and upon identification, a nationwide bulletin for the car and its occupants was issued by the Yavapai County Sheriff's office. Appellant Bishop, Mrs. Leckliter and her daughter were apprehended near Houston, Texas; Van Haelst was apprehended in Texas several days later. Following a mandatory hearing before a Texas magistrate where he was informed of his Miranda rights and following questioning by Arizona authorities in Texas, appellant Bishop admitted his acts and agreed to conduct a videotaped "walk-through" of the crime at the scene for the authorities upon his arrival back in Arizona.

Based upon appellant's own statements and the testimony of law enforcement officers, the Yavapai County Grand Jury returned an indictment for first-degree murder on March 22, 1976. Appellant was subsequently arraigned and after a suppression hearing, his trial and conviction followed.

Appellant has raised the following issues for our consideration:

1. Whether the confession made by appellant in Texas should have been suppressed;

2. Whether appellant's statements at a videotaped "walk-through" of the crime were voluntary;

3. Whether the evidence presented was sufficient to sustain the trial court's sentence;

4. Whether sufficient mitigating factors existed so as to call for leniency in sentencing;

5. Whether imposition of the death penalty was excessive;

6. Whether the provisions of A.R.S. § 13-454 were unconstitutionally vague; whether the imposition of a death sentence constituted cruel and unusual punishment.

1. SUPPRESSION OF THE CONFESSION: THE PROSECUTOR'S TESTIMONY

Appellant has advanced the argument that it was improper for Mr. Kuebler, the Yavapai County Attorney to have testified at the omnibus hearing in a case he alone was prosecuting. Additionally, appellant argues that the statement was not shown to be voluntary because the prosecutor was the only witness, other than the appellant, as to what transpired when appellant and the prosecutor were the only ones present. Appellant has not questioned the truth of the prosecutor's testimony, merely the fact of his testimony.

Appellant's contention is totally without merit because there was another witness to the conversation between appellant and the prosecutor, and the state proved the voluntariness of the confession independently through the testimony of that witness, Detective Stephens. Secondly, the prosecutor's testimony

was given at the insistence of the appellant.

The Stephens testimony disclosed that after about an hour and a half of questioning by Kuebler in Texas, the appellant asked to speak with him alone. Stephens remained outside the interrogation room within easy hearing distance primarily out of concern for Kuebler's safety. Thus, Stephens was able to testify that once alone with Kuebler, appellant said, "I might as well tell you the truth. I was lying about that other statement." The appellant then proceeded to relate the details of the crime to the prosecutor, which details were later reduced to a written statement and signed by appellant.[1]

Detective Stephens also testified that he did not hear the prosecutor make any threats or offer any inducement for this statement. The appellant has never claimed either before the trial court or on appeal that any threats, or force, or offers were made to him for the statement.

Unlike the situation in State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960), the conversation alone with the prosecutor here was initiated by the appellant, and the state offered independent evidence of what took place between appellant and the prosecutor. Once the prosecution met its burden of showing

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[1]The record reflects that appellant was given the required Miranda warnings at each stage of the questioning and before he gave his written statement.

As a further indication of the appellant's state of mind and his appreciation of the serious penalty he would face, we note the following exchange between appellant and the prosecutor which took place just prior to appellant's giving his written statement and which was testified to by Wallis and Stephens:

Appellant: Does the State of Arizona still use the electric chair?

Kuebler : No, Arizona uses lethal gas.

Appellant: Well, gas is not so bad.

that the confession was freely and voluntarily made, the defense was under an obligation to rebut. State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960). No evidence was presented by the defense at the suppression hearing. The only defense tactic was to call the prosecutor as an adverse defense witness to testify to facts already in evidence through Detective Stephens. The testimony of Kuebler merely corroborated that of Stephens and was at most cumulative.

The device of calling the prosecutor here at a pretrial hearing as an adverse defense witness will not be approved by this court as a means for disqualifying the prosecutor from continuing to conduct the case where the testimony, although relevant, is merely cumulative and not necessary to the defense of the case. Johnson v. State, 23 Md. App. 131, 142, 326 A.2d 38, 45 (1974), aff'd per curiam, 275 Md. 291, 339 A.2d 289 (1975). The wide latitude that the trial court gave the defense in questioning the prosecutor served to be more in the nature of additional discovery. There was no abuse of discretion in permitting Kuebler to continue to act as prosecutor in the case. The ruling that appellant's statement was voluntary was correct under the circumstances shown by the hearing.

2. THE VIDEOTAPED WALK-THROUGH

Upon appellant's return from Texas to Arizona, before he was incarcerated in the Yavapai County Jail, he participated in a videotaped walk-through of the crime at the scene. In attendance were the appellant, Van Haelst, County Attorney Kuebler and several Yavapai County law enforcement officers.

This videotape was admitted into evidence by the trial judge.

Appellant's main objection is that the Miranda warnings given him at the scene were not sufficient to support a knowing, voluntary and intelligent waiver of those rights on his part. Appellant has argued that the drive back from Texas with the Arizona law enforcement officers, and the fact of his attendance at the walk-through with only the prosecutor and the officers present were "derived coercion" on the part of the state depriving him of his free will.

There is no testimony to support this contention by appellant. In fact, there is an abundance of evidence which supports the opposite conclusion.

The appellant was apprehended in Texas and given the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) at the time of his arrest. The Texas Criminal Code provides that after arrest, an individual must be taken before a magistrate and formally advised of his rights before any statement given can be used as evidence against him in a court of law. Accordingly, appellant was taken before a magistrate within approximately four hours after his arrest. He was formally charged, again given his Miranda rights and he signed a statement acknowledging that he understood those rights.[2]

Some questioning occurred after the appearance before the

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[2]For the sake of brevity, we state here that the testimony and written evidence in the record reflect the fact that at each stage of his questioning and before any statements (written or oral) were taken, appellant was given the warnings mandated by Miranda, supra.

magistrate, during which appellant told the Texas police that he would only admit to having stolen Troxell's car and to having had "a squabble" with the victim.

The appellant adhered to this statement the next day when questioned by County Attorney Kuebler. However, after being told that Van Haelst had been apprehended, the appellant asked to speak with Kuebler alone, and thereafter made a confession as set forth previously.

The following day, when appellant appeared before a Texas judge for an extradition hearing, the judge asked whether he agreed to return to Arizona to face murder charges. Appellant said, "Yes, sir, I made a mistake and I want to go back to take care of it."

It is against this background of the many constitutional warnings given appellant and the failure of appellant to produce any evidence of impropriety regarding this sequence of events at trial that we view appellant's claim that the videotaping was a "derived coercion" on the part of the authorities.

We find this contention, in the context of the record before us, to be without merit.

Appellant offered no evidence to suggest that his will was overborne. State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974). The police testified that appellant's attitude throughout the taping was "cooperative." Sergeant Mart, who participated in filming the walk-through, testified on cross-examination at the suppression hearing to the following exchange which occurred just before the filming took place:

Mr. Hicks: "At that time do you also mention to him that anything that he does in the way of physical actions will be used against him?"

Sgt. Mart: "Yes.

"Q So what did you say?

"A I told him what we had in mind, that we were going to have a walk-through and pictures would be taken on a sound tape.

"Q And did you tell him that if he did something in the way of physical movements that it would be used against him?

"A He told me that he had done wrong and he wanted to come over here and straighten it out."

There is no testimony to support the argument that appellant did not voluntarily waive his rights at the scene. Appellant's own statement at the end of the tape belies his lack of understanding of the proceedings. Appellant said, "I broke the violation of my rights and wanted to get everything on tape and sound for the judge if I decided to have a closed hearing."[3]

Although he was later represented by an attorney, the record does not indicate that appellant requested the services of an attorney at any time prior to and including the videotaping.

We have previously held that Miranda v. Arizona, supra, does not require a policeman to go out voluntarily and obtain a lawyer for a defendant unless the defendant after being advised of his rights makes a specific request. State v. Jenkins,

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[3]Appellant's motivation for making the statement is not clear from the record because appellant offered no testimony on the issue. The prosecutor posited the theory that appellant had some fears about retribution from the victim's family and did not wish to appear in open court. There is no evidence to suggest that appellant's belief that he could control his appearance at trial was in any way induced by the prosecutor.

111 Ariz. 13, 14, 522 P.2d 1090, 1091 (1974). We think that the same principle is applicable here. Once the police had repeatedly advised appellant that he had inter alia a right to remain silent, there was no duty for the police to tell him that he did not have to participate in the walk-through. Appellant's participation was, from the testimony in the record, voluntary. State v. Edwards, supra.

3. THE VOLUNTARINESS OF THE CONFESSION AND THE VIDEOTAPE.

The common thread, of course, running through appellant's arguments on the admission of the confession and the videotape is voluntariness. For the reasons which follow, we conclude that both were legally voluntary, and therefore properly admitted into evidence by the trial court.

We start from the premise that in Arizona confessions and statements are prima facie involuntary and the burden is on the state to show that they were freely and voluntarily made, and not the product of physical or psychological coercion. State v. Edwards, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974); State v. Holden, 88 Ariz. 43, 48, 352 P.2d 705, 709 (1960). However, the trial court's determination of their admissibility will not be upset on appeal, absent clear and manifest error. State v. Jordan, 114 Ariz. 452, 455, 561 P.2d 1224, 1227 (1976); State v. Edwards, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974).

A defendant has the constitutional right to object to the use of a confession and to have a fair hearing to resolve the issue of the voluntariness. Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed.2d 908 (1964); State v. Smith,

114 Ariz. 415, 419, 561 P.2d 739, 741 (1977).

The record discloses the following factors which we consider to be significant in our conclusion that the confession and videotape were voluntary and therefore validly admitted into evidence:

1) Appellant was repeatedly and continuously warned of his Miranda rights at all stages from his initial arrest in Texas through and including his incarceration in Arizona;

2) Appellant refused to answer some questions posed by interrogating officers, indicating that he understood his right to remain silent;

3) There is no evidence in the record that appellant requested counsel, or that he was denied counsel after being warned of his constitutional rights;

4) Appellant was not interrogated for long periods of time or in circumstances which would suggest that his will was in any way overborne;

5) There were no allegations of threats or promises or benefits alleged or testified to which would bear on the inducement of the confession.

Appellant did not put forth evidence at the suppression hearing to contest the admission of the confession, or to rebut the above factors.

We hold that the confession and videotape were intelligently, voluntarily and knowingly made, and that their admission into evidence was therefore proper.

4. THE SUFFICIENCY OF THE MITIGATING FACTORS

The burden of establishing mitigating factors is on the defendant. A.R.S. § 13-454(B). State v. Richmond, 114 Ariz. 186, 198, 560 P.2d 41, 53 (1976), cert. den., ____ U.S. ____, 97 S. Ct. 2988, 53 L. Ed.2d 1101 (1977).

In State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. den., ____ U.S. ____, 97 S. Ct. 2988, 53 L. Ed.2d 1101 (1977), we upheld the constitutionality of Arizona's death penalty statute under the U.S. Supreme Court's holdings in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed.2d 913 (1976) and Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976). In Proffitt, the U.S. Supreme Court construed and found constitutionally sufficient a Florida sentencing statute which is indistinguishable from Arizona's statute.

We said in Richmond that the statutory system enacted by our legislature with regard to aggravating and mitigating circumstances, gives the trial judge the "adequate information and guidance" mandated by Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972). The narrow limits of the aggravating and mitigating factors which the trial judge is directed to consider insures that the death penalty will not be arbitrarily, capriciously or freakishly imposed. State v. Jordan, 114 Ariz. 452, 456-457, 561 P.2d 1224, 1228-1229 (1976). According to our law, the trial judge is bound, as are we, to consider only those aggravating and mitigating factors listed in the statute. A.R.S. § 13-454(D).

Under the circumstances, the trial judge was correct in refusing to consider appellant's lack of a prior conviction

as a mitigating factor under A.R.S. § 13-454(F).[4]

Appellant contended at trial (contrary to his confession) and at the mitigation hearing that he was under "unusual and substantial duress." He contended that he feared Troxell and that he murdered him in self-defense.

The evidence disclosed that appellant planned to kill Troxell for over a day before he did so because he wanted Troxell's car and he disliked Troxell's drinking habits. Troxell was struck between two and four times with a hammer by appellant. Once Troxell fell to the ground, the appellant immediately and systematically removed Troxell's shoes, his wallet and his money. Having accomplished that, appellant hog-tied Troxell's legs, dragged him to a mine shaft and returned shortly thereafter to drop rocks and dirt on the victim, who lay struggling at the bottom of the hole. Subsequently, appellant cleaned up the campsite by covering the bloodstains with dirt, burned some of Troxell's possessions and threw the rest over a cliff. When the group left the site for town, appellant took the time to give a ride to a stranded motorist. These actions do not, in our opinion, indicate signs of duress.

From an independent review of all the factors involved here, we find no mitigating factors sufficiently substantial to outweigh the aggravating circumstances. State v. Blazak, 114 Ariz. 199, 206, 560 P.2d 54, 61 (1977); State v. Richmond, 114 Ariz. 186, 198, 560 P.2d 41, 53 (1976), cert. den., ____ U.S. ____, 97 S. Ct. 2988, 53 L. Ed.2d 1101 (1977); State v. Jordan,

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[4]We have read those cases cited to us by appellant which hold that a defendant's conduct should be considered by the trial court in sentencing. While none of the cases are factually relevant here, we note as well that each case was decided before the present A.R.S. § 13-454 became law in 1973. Those prior cases obviously are not applicable under the current law which clearly mandates what factors are to be considered aggravating and mitigating. A.R.S. § 13-454(D).

114 Ariz. 452, 456, 561 P.2d 1224, 1228 (1976).

5. THE EXCESSIVENESS OF THE DEATH PENALTY IN THIS CASE

Appellant has urged that the death sentence was excessive in this case, because his sentence was not comparable to those of Van Haelst who received a forty to sixty-year sentence and Leckliter, who received six months in the county jail. Both Van Haelst and Leckliter's sentences resulted from a negotiated plea bargain.

We have discussed our view of the absence of mitigating factors here and we will not repeat them. We have consistently held that where there are no mitigating factors and an aggravating factor does exist, the sentence of death is within the statute and neither excessive nor unconstitutional. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. den., ____ U.S. ____, 97 S. Ct. 2988, 53 L. Ed.2d 1101 (1977); State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977); State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977).

As to appellant's objection to the Van Haelst and Leckliter sentences, we think that the practice of plea bargaining in a criminal case is neither unusual nor unconstitutional. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976).

It is true that Van Haelst was indicted for first-degree murder with Bishop. Leckliter was separately indicted for felonious theft of Troxell's automobile. The crucial mitigating factor in both Van Haelst's and Leckliter's cases is found in A.R.S. § 13-454(F)(3):

> He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his

participation was relatively minor, although not so minor as to constitute a defense to prosecution.

We think that the key factor in this section is that an individual's relative participation in the crime is a mitigating factor to be taken into account. When we look at the relative participation here of Van Haelst, Leckliter and Bishop and compare their sentences, we see nothing excessive in the sentence imposed on appellant. State v. Holsinger, 115 Ariz. 89, 98-99, 563 P.2d 888, 897-898 (1977).

6. CONSTITUTIONALITY OF THE DEATH PENALTY

We have previously held that Arizona's death penalty statute is constitutional and we feel that there is no need for further discussion of that issue. See State v. Richmond, supra.

Pursuant to A.R.S. § 13-1715 we have searched the record for fundamental error, and find none. The judgment and sentence of the trial court are affirmed.

WILLIAM A. HOLOHAN, Justice

CONCURRING:

JAMES DUKE CAMERON, Chief Justice

FRED C. STRUCKMEYER, JR.,
Vice Chief Justice

JACK D. H. HAYS, Justice

FRANK X. GORDON, JR., Justice

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA

Phoenix
85007

March 1, 1978

STATE OF ARIZONA,

Appellee,

v.

RONALD PAUL BISHOP,

Appellant.

No. 3569

NOTICE OF MAILING

FILED
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CLERK SUPREME COURT
BY

The Supreme Court of the State of Arizona has this date handed down its decision in the above-entitled cause, in which the judgment and sentence of the trial court are affirmed.

A copy of the decision is enclosed herewith.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Deputy Clerk

TO:

The Honorable James Hancock, Judge, Superior Court of Yavapai County, Division 2, Yavapai County Courthouse, Prescott, AZ 86301

Mr. William J. Schafer III and Ms. Diane M. DeBrosse, Assistant Attorneys General, 159 Capitol Building, Phoenix, AZ 85007

Mr. David Chamberlain, Attorney at Law, 533 West Gurley, Prescott, AZ 86301

(35)

Supreme Court, U. S.
FILED
JUN 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-6992

RONALD PAUL BISHOP,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

MOTION FOR EXTENSION OF TIME OR IN THE ALTERNATIVE MOTION TO FILE DELAYED WRIT OF CERTIORARI

Petitioner, by and through his Attorney undersigned moves the Court for an extension of time in which to file a Writ of Certiorari in the above captioned case or alternatively to file said writ as a delayed Writ, in either case not to exceed fifteen days for the reasons that:

1. Petitioner's Pauperis Affidavit has been delayed for the reason of difficulty at the Arizona State Prison where petitioner is incarcerated.

2. For the reason that counsel has experienced some difficulty in finding two qualified members of the United States Supreme Court to certify his application thereto.

Petitioner's Writ of Certiorari is filed together with this Motion.

DAVID CHAMBERLAIN
ATTORNEY FOR PETITIONER

RECEIVED
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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OCTOBER TERM, 1977

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-vs-

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR

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QUESTIONS PRESENTED

I. DOES THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR?

II. WAS PETITIONER DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER? DID THE COURT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH?

III. WAS BISHOP IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL?

STATEMENT OF THE CASE

On January 18, 1976, petitioner, Ronald Paul Bishop, victim Norman Troxell, Fred Van Haelst, Catherine Leckliter, and Catherine's 2-year-old daughter met at the Salvation Army Welfare Center on 9th Avenue in Phoenix. (R.T., Vol. III at 303, Vol. IV at 535.) Norman Troxell was the only one of these individuals who had a car, a 66 Chevrolet Caprice. (R.T., Vol. III at 307.) They decided to travel together. (Id. and R.T., Vol. IV at 539.) On January 20 the group left Phoenix and traveled to the Bumble Bee area near Prescott. (R.T., Vol. III at 308, R.T. June 10, 1976 at 14.) They camped out in the open that evening. During the course of that evening Bishop, Leckliter, and Van Haelst discussed the problem of Troxell's continual drinking. (R.T., Vol. III at 310, Vol. IV at 546, June 10, 1976 at 15.) Troxell was apparently drunk all of the time, and spent most of the time sleeping in the back seat of the vehicle. (R.T., Vol. IV at 542.) In the conversation concerning Troxell's condition, Van Haelst suggested they could "try to sober him up." (R.T., Vol. III at 310.) Bishop said that would do no good, and that they would have to "get rid of him" or "do him in." (Id. and R.T., June 10, 1976 at 16.) There was further conversation along the same lines, the following day. (Id.) Bishop stated they had to do Troxell in because they needed the car. (R.T., June 10, 1976 at 16.)

On the morning of January 22, Bishop told Van Haelst that "he had found the perfect place to put him in." (R.T., Vol. III at 313 and 316.) The party went into town for groceries, then returned to the campsite. Van Haelst, at Bishop's direction, told the woman, Leckliter, to take the little girl and go for a walk. (R.T., Vol. III at 317, June 10, 1976 at 16.) Troxell was sleeping in the car. Bishop went over by the car, and asked Troxell to get out of the car. (R.T., Vol. IV at 555, June 10,

1976 at 17.) Troxell got out and went to the back of the vehicle to urinate. (R.T., June 10, 1977 at 17.) At that time Bishop struck Troxell on the head with a hammer. As Troxell went down Bishop struck him at least once more. (Id. at 17-20.) Bishop removed Troxell's wallet, watch, and shoes. (Id. at 20 and R.T., Vol. IV at 564.) Then Bishop hog-tied Troxell's feet with rope. Bishop had taken the rope off a dead cow earlier, and placed it in the trunk. (R.T., June 10, 1976 at 21; Vol. IV at 566.) Bishop and Van Haelst dragged Troxell toward a mine shaft. Troxell was gasping and still alive. (R.T., June 10, 1976 at 22.) Bishop put Troxell on the edge of the hole, believing Troxell would fall in the hole because Troxell was still alive and struggling. [Statement of Appellant Bishop (State's Exhibit 3 for Voluntariness Hearing, admitted into evidence at R.T., Vol. I at 76]; also R.T., Vol. IV at 569.) He fell into the mine shaft. (Id.) Bishop then threw rocks up to a foot and half in diameter into the hole on top of Troxell, who Bishop said was then wiggling around or trying to get up. [State's Exhibit 6 for Voluntariness Hearing (transcript of videotape); also R.T., June 10, 1976 at 23.)

Following the murder of Troxell, Bishop and the others traveled in Troxell's car to Oregon, and finally to Texas. An identification of the murder victim's body caused a nation-wide bulletin to be issued giving the description and license number of the Troxell vehicle. (R.T., Vol. I at 26.) Texas law enforcement officers spotted the car, and stopped and arrested its occupants, Bishop and Leckliter, at which time Bishop received the Miranda warnings. (R.T., Vol. I at 59.) Upon arrival at the police station, Bishop was again given the Miranda warnings. (R.T., Vol. I at 60.) Texas law required that Bishop immediately be given Miranda warnings by a Magistrate.

This was done, Bishop being advised in person by the Magistrate and signing a written form explaining the rights. (R.T., Vol. I at 61-63, State's Exhibit for Voluntariness Hearing.)

Bishop had had Leckliter draw up a false bill of sale for the Troxell vehicle. (R.T., Vol. III at 305 et seq., Testimony of Leckliter.) Initially, Bishop stated that the most the law enforcement officers had on him was stolen vehicle. (R.T., Vol. I at 65.) Subsequently Bishop made a statement to the Texas authorities. Before making it he was reminded of his Miranda rights. In it he claimed Troxell was alive when he left him. (R.T., Vol. I at 65, State's Exhibit 2 for Voluntariness Hearing.)

Catherine Leckliter abandoned the store about the false bill of sale, and confessed to authorities her knowledge of what went on. (R.T., Vol. I at 57.)

At a second interview, prior to which Bishop was again reminded of his Miranda rights, Yavapai County Prosecutor Robert Keubler was present. (R.T., Vol. I at 70.) At one point in the interview, Bishop learned that Van Haelst had been apprehended. At that point he stated that he wished to talk to Kuebler in private. (R.T., Vol. I at 72 and 107.) The law enforcement officers left the room, but Detective Stephens did not leave the area. (R.T., Vol. I at 107.) Leaving the door cracked, Detective Stephens remained just outside within 2-3 feet of appellant where he could see Bishop and hear what was said. (R.T., Vol. I at 108.) He heard Bishop say "I might as well tell the truth. I was lying about that other statement." (R.T., Vol. I at 108.) Then Detective Stephens heard Bishop tell Kuebler what really happened. (R.T., Vol. I at 109.)

After about 5 mintues, the law enforcement officers were asked back into the room. (R.T., Vol. I at 110.) At that point Bishop repeated his new statement to the officers. The statement was typed up from notes made by the officer and the

prosecutor. (R.T., Vol. I at 74-76.) Bishop read the statement, which included once more, the Miranda warnings, and signed it. (Id. and State Exhibit 3 for Voluntariness Hearing.)

Upon being returned to Arizona, Bishop agreed to a video-taped "walk-through" at the scene of the murder. He was advised of his Miranda rights prior to reaching the area, and told they intended to film the walk-through. (R.T., Vol. I at 33 and 47.) At the area before filming, he was asked whether he had been advised of those rights and responded that he had been. (R.T., Vol. I at 135.) Bishop identified the type of hammer he had used, and showed the officers where the events of the murder had occurred. (R.T., Vol. I at 131-68.)

After a trial by jury, Bishop was found guilty of the first degree murder of Norman Troxell. (See Minute Entry dated May 19, 1976 at 3.) An aggravation-mitigation hearing was held, following which the trial court found that the murder had been committed in an especially heinous, cruel, or depraved manner. The court further found no mitigating factors sufficient to call for leniency. (R.T., Vol. V at 38-42.) The death penalty was therefore imposed. Bishop's conviction and sentence of death were affirmed by the Arizona Supreme Court on March 1, 1978. State v. Bishop, ____ Ariz. ____, 576 P.2d 122 (1978).

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ARGUMENT

I

THE ARIZONA STATUTE GOVERNING THE IMPOSITION OF THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE CHARACTER AND RECORD OF THE OFFENDER AS A MITIGATING FACTOR.

Petitioner contends that the Arizona death penalty law is unconstitutional because it improperly limits the mitigating factors the court may evaluate, and focuses on the nature of the offense itself rather than the character of the offender. Petitioner urges that Arizona's death penalty provision does not resemble the statutory schemes of states whose death penalty provisions have been upheld by this Court.

The United States Supreme Court granted a petition for writ of certiorari in Jordan v. Arizona, No. 76-6965 (U.S., July 3, 1978), a death penalty case. The United States Supreme Court vacated that portion of the opinion of the Arizona Supreme Court that left undisturbed the death penalty imposed on petitioner Jordan. The court remanded the case to the Arizona Supreme Court for proceeding in harmony with Lockett v. Ohio, 438 U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1978).

On July 20, 1978, the Arizona Supreme Court issued its opinion in State v. Watson, No. 3089 (July 20, 1978), a death penalty case, which challenged the number and type of mitigating factors utilized by the court in fixing capital punishment. (See Attachment A.) In the Watson decision, the Arizona Supreme Court determined the statutory restriction on the presentation of mitigating factors pursuant to Ariz.Rev. Stat.Ann. § 13-454 was unconstitutional. In view of the fact Ariz.Rev.Stat.Ann. § 13-454 (under which petitioner was sentenced) is now deemed invalid, it appears petitioner's recourse is in some state judicial hearing. Respondent submits it is presently unnecessary for the United States Supreme Court to consider petitioner's

application for writ of certiorari since the primary issue upon which he relies, Issue I, is moot.

ARGUMENT

II

PETITIONER WAS NOT DENIED DUE PROCESS FAIRNESS OR THE EQUAL PROTECTION OF THE LAWS WHEN THE COURT DETERMINED THE VICTIM WAS KILLED IN A CRUEL OR HEINOUS MANNER. THE COURT DID NOT IMPROPERLY IMPOSE THE DEATH PENALTY AFTER DETERMINING THAT AN AGGRAVATING CIRCUMSTANCE EXISTED -- TO WIT, THE CRUEL MANNER OF DEATH.

Bishop contends that the aggravating circumstance of Ariz. Rev.Stat.Ann. § 13-454 of a cruel or heinous slaying which warrants the imposition of the death penalty, is not harmonious with the constitutionally valid death penalty statute and former cases of Florida.

Following the trial and aggravation hearing in this matter, the trial court pronounced sentence in petitioner Bishop's case. In regard to the aggravating circumstances the court stated:

> "In determining aggravating circumstances I have considered only evidence admitted at the trial of this case and [evidence] governed by the Rules for the admission of evidence at the criminal trial.
>
> * * *
>
> "Pursuant to A.R.S. 13-454E, as to aggravating circumstances, I find as follows:
>
> * * *
>
> "I do find that you committed the offense in an especially heinous, cruel or depraved manner.
>
> "Mr. Bishop, I find your murder of Norman Troxell was a malicious, premeditated, vicious act designed to inflict a high degree of pain with utter indifference for the suffering or regard for human life. Your use of a hammer as the murder weapon was cruel; it was designed to inflict, and did inflict a high degree of pain.
>
> "Your crime was unnecessarily torturous to the victim because he was apparently alive when you tied his feet and pulled him along

the ground to the mine shaft. You left Mr. Troxell later to return and find him at the bottom of the shaft wherein you proceeded to throw rocks and dirt on him.

"Your act lacked any moral sense, any appreciation for life.

"What you did was vicious beyond the comprehension of the ordinary person.

"What you did was outrageously cruel and heinous and done in a depraved manner."

(R.T., Vol. V at 38-41.)

Bishop contends that the murder of Troxell was not cruel and heinous since the pathologist did not so characterize that slaying. Dr. Phillip Keen, the Yavapai County Coroner, testified Troxell died from multiple skull fractures. The doctor stated that approximately simultaneous with the head injuries, Troxell's leg was broken. (R.T., Vol. II at 280-90.) Bishop has not cited any authority for his theory that a cruel and heinous murder can only be established by medical testimony. In the matter sub judice it was unnecessary to examine the doctor on the quality and type of death Troxell met, since petitioner by his own words and recollection of the events surrounding the killing gave facts which demonstrated the murder was indeed heinous and cruel.

According to Bishop's own statements his victim was slowly killed:

"He turned sideways and I hit him in the front part of the head with the hammer. It wasn't actually that hard. I hit him a second time in the back of the head. He fell but he wasn't unconscious.

"I heard someone say 'there's a truck coming,' so I put the rope around his feet and gradually pulled him down to where the open shaft was. That was about fifty feet. The shaft was about eight or nine feet deep. I put Norman on the side of the hole. He was struggling and he fell into the hole. I believed he would fall into the hole."

(Statement by appellant, R.T., Vol. I at 414, State's Trial Exhibit 16 admitted into evidence at R.T., Vol. I at 411.) (Emphasis added.)

And:

> "Bishop: He was dragged down the road where at that time he was still alive. Ah, he was dragged by the edge of this here and let down slowly with my hands on him so he wouldn't roll fast enough to hit his head on anything. Like I repeat to say, he was still alive at that time and he was laying cross-ways with his head this way and his feet were tied at that time. . . . After dragging him down or gradually letting him down the hill, he was placed on this spot here. I'd say approximately one . . . two feet from the entrance of the pit. The pit. We call that pit a hole. I went back up to the top of the hill to check to see if any vehicles was coming down, where there wasn't. When I remained back down here he was in the hole . . . uh . . . by wiggling around or trying to get up, one or the other. So to cover up this - . . uh . . . body or the clothing, there was rocks placed on top of him . . . uh loose sand and loose rocks."
>
> (Transcript of Videotape, State's Trial Exhibit 19A, admitted into evidence at R.T. Vol. IV at 532.) (Emphasis added.)

And:

> "Q. And what was done with Mr. Troxell at that time?
>
> "A. He was drug from behind the car.
>
> * * *
>
> "Q. Can you describe what you saw, what his physical condition was?
>
> "A. He was gasping. He was still alive. . . ."
>
> (Testimony of Fred Van Haelst, R.T., June 10, 1976 at 22.) (Emphasis added.)

Thus, after a 2 day discussion, Bishop decided to kill Norman Troxell because Troxell was a drunk, and also because Bishop wanted Troxell's car. Bishop struck his victim with a hammer while the victim, half drunk and unaware of the impending blow, was urinating. When the victim fell, moaning, to his knees, Bishop struck him on the head with the hammer a second time. Using a piece of rope taken from a dead cow, Bishop dragged his

victim, who was still alive and gasping, to the edge of an empty mine shaft. While Bishop went to check for possible observers, the victim, who was struggling and writhing near the edge of the hole, fell helplessly into the abandoned shaft. Bishop returned and finding his victim already in the hole, proceeded to throw gravel and rocks, some as large as 1 foot in diameter on top of the victim. Bishop then proceeded calmly away from the scene in the victim's car, for which he subsequently forged a bill of sale. The record therefore shows the trial court correctly determined that the killing of Norman Troxell was done in an especially heinous, cruel and depraved manner. Ariz.Rev.Stat.Ann. § 13-454(E)(6).

Bishop's citation to the Florida cases of State v. Dixon, 283 So.2d 1 (Fla. 1973); Swan v. State, 322 So.2d 485 (Fla. 1975), Alford v. State, 307 So.2d 433 (Fla. 1975), are not useful to the resolution of the issue he raised and do not support his legal theory. In each of the foregoing cases, the Florida Supreme Court reviewed the imposition on the death penalty upon an offender who murdered his victim in a manner determined by the court to be cruel or heinous. Those cases do not demonstrate the infirmity of the similar Arizona death penalty statute. Those Florida cases do not indicate Bishop was denied due process fairness when the trial court determined Troxell met his death in a cruel and heinous way.

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ARGUMENT

III

BISHOP WAS NOT IMPROPERLY DENIED EITHER HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF OR HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE PROCEEDED TO COOPERATE IN A VIDEOTAPED WALK-THROUGH OF THE CRIME WITH LAW ENFORCEMENT AUTHORITIES WHICH STATEMENTS AND EVIDENCE WERE SUBSEQUENTLY ADMITTED AT TRIAL.

Bishop urges that the court erred in allowing evidence of his statements at a videotaped interview to be admitted. Bishop has not advanced any legal theory or appropriate citations to authority to support this hypothesis.

The record below indicates that Bishop was advised of his Miranda rights prior to the walk-through, and indicated he understood them. (R.T., Vol. I at 33-34, 147, 170.) The purpose of the walk-through and the fact of videotaping were explained to him prior to advising him of the Miranda rights. (R.T., Vol. I at 34, 43, 46-48, Vol. IV at 581.) Bishop was cooperative in allowing the videotape. (R.T., Vol. I at 148.) Detective Meritt testified: "I do recall him [Bishop] indicating his agreement as he did on film, to go along with the filming." (R.T., Vol. I at 172.) Finally, Bishop stated:

> "Okay, before this started ah, I was advised of my right to stay silent and not to have anything said not unless I wanted an attorney present. I broke the violation of my rights and wanted to get everything on tape and sound to have a closed hearing."
>
> (Transcript of videotape, State's Trial Exhibit # 19A.)[1]

---

[1] Bishop's reference to a "closed hearing" apparently referred to the possibility that he could get a closed trial because of his fear of retribution by the victim's family. (See R.T., Vol. I at 203, Vol. IV at 587.)

The preponderance of the evidence supports the trial court's determination that Bishop's participation in the videotaped walk-through was voluntary and was done with the understanding that, pursuant to Miranda warnings, his statements and actions on the tape could be used against him at trial.

The trial court correctly denied Bishop's motion to suppress. Bishop was not improperly denied any constitutional right.

CONCLUSION

The petition for writ of certiorari should be denied for one or more of the foregoing reasons.

Respectfully submitted,

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the State of Arizona

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